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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GREENHILL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 22, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioner herein, Kalman Greenhill, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on June 29, 1962.

CITATION TO OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Second Circuit, dated June 29, 1962, is not yet reported. A copy of that opinion is attached hereto as an Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1962, and a timely petition for rehearing was denied on July 23, 1962. This petition is filed within 30 days from the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a defendant, in a criminal prosecution arising out of a bankruptcy proceeding, is entitled by virtue of the Bankruptcy Act and the principles of fair judicial administration to inspect an accountant's report submitted to the bankruptcy trustee in his official capacity.

STATUTORY PROVISIONS INVOLVED

Bankruptcy Act, Sec. 47(a)(10), 11 U.S.C.A. § 75(a)(10):

> (a) Trustees shall . . . (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest . . .

Bankruptcy Act, Sec. 49, 11 U.S.C.A. § 77:

> The accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest.

STATEMENT OF THE CASE

Petitioner was tried and convicted, after a jury trial, on a three-count indictment charging him with transferring assets of the Westco Steel Co. during 1955 in anticipation of bankruptcy and with intent to defeat the Bankruptcy Act, in violation of 18 U.S.C. §§ 152 and 2. The trial took place in the United States District Court for the Southern District of New York. On December 18, 1961, petitioner was sentenced to imprisonment for a year and a day on each of the three counts, the sentences to run concurrently. The Court of Appeals for the Second Circuit affirmed the judgment of conviction on June 29, 1962.

The indictment charged that on January 7, 1956, a petition for arrangement had been filed in a federal district court in the Northern District of California on behalf of Westco Steel Co., which was thereafter on March 1, 1956, adjudicated a bankrupt. Between February 8, 1955, and March 1, 1956, petitioner, while an officer of that corporation, allegedly transferred fraudulently to himself some $16,500 in contemplation of this bankruptcy proceeding. It was further alleged that during the same period petitioner had fraudulently transferred money of Westco to LaSalle Industries, Inc., in the sum of nearly $26,000 and to American Wood Products Co., Inc., in the amount of $8,100. Petitioner allegedly owned or controlled both LaSalle and American Wood.

The facts developed at the trial showed a maze of complicated and intercorporate financial transactions. The trial transcript covers 780 pages and some 500 exhibits, many of them technical accountants' reports and financial statements. The testimony of accountants was critical in attempting to sort out these trans-

actions and to demonstrate where and why the various loans and payments were made.

Petitioner's defense basically was that he was attempting to create and operate a small-scale multi-corporate empire, that Westco was purchased as a part of that plan, and that diminished sales and increased expenses were the true causes of Westco's financial collapse. The payments from Westco to the other corporations, in petitioner's view, were legitimate intercorporate loans, balanced in many instances by repayments to Westco. And payments to petitioner himself, as the financial adviser and managerial head of the small empire, were either legitimate payments for services rendered (Tr. 332) or represented part of the intercorporate relationships.

Basic to petitioner's defense was a demonstration that these payments were not made in contemplation of bankruptcy and that the bankruptcy was in fact caused by economic difficulties that were both unavoidable and unpredictable. To that end, it was essential that he secure all financial data relating to the bankruptcy in 1956, the indictment itself covering the period from February 8, 1955 to March 1, 1956. The records of that bankruptcy proceeding in the federal court in California thus became of prime importance to him, especially since Westco's financial records contained no entries after November 30, 1955. Tr. 144. To trace the events covered by the indictment and culminating in the bankruptcy adjudication on March 1, 1956, necessitated access to and study of the more complete financial records of the bankruptcy trustee.

Accordingly, at the beginning of the trial and in the course thereof petitioner moved for the production by

the Government of a report in its possession made by the accountant for the trustee in bankruptcy. The second application was made in the following language (Tr. 416):

> "If your Honor please, as your Honor recalls, before the beginning of this trial, I made a motion, an oral motion, demanding the production of the accountant's report, the balance sheet, profit and loss statement and other reports prepared by the accountant for the trustee in bankruptcy, which is a public record and which, when we saw it, was not available in Oakland, California. I was advised by Mr. Edwards [the Assistant United States Attorney], as I told your Honor at that time, that that report was in his possession, and I made a motion demanding the production of that report.
>
> "At this time, if your Honor please, I again make that demand."

The application was denied by the District Judge and an exception was duly taken. Tr. 416-417.

In the course of the appeal proceedings before the Court of Appeals, the Government submitted to the judges of that court[1] the following affidavit by Martin J. Dinkelspiel, an attorney for the trustee in bankruptcy of Westco Steel Co.:

> "* * * In my capacity as attorney and under instructions from John Costello, Trustee in Bankruptcy, I prepared a petition for said Trustee requesting authority and an order authorizing the

[1] The Dinkelspiel affidavit was submitted directly to the judges of the Court of Appeals by the United States Attorney as an attachment to a letter dated June 20, 1962, replying to petitioner's reply brief "in accordance with the suggestion of the Court made at the time of oral argument on June 4, 1962." The affidavit does not appear in the record as certified by the clerk of the court below.

employment of Mr. Peter Barnett, a Certified Public Accountant, at that time residing in the City and County of San Francisco, for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955, with particular reference to the withdrawals and payments made to or for the account of the aforesaid Kalman Greenhill, American Bobbin Company, LaSalle Industries, Inc. of New York and LaSalle Industries, Inc. of Maine.

That on or about April 5, 1956, Mr. Barnett submitted this report to me for the Trustee. The purpose of the report was to enable further examination of officers and directors of the bankrupt and to lay the foundation, if any existed, for both civil and possible criminal action against Kalman Greenhill and others. This report was at no time filed with the Referee in Bankruptcy and made a part of the bankruptcy records. This was a private report for the use and benefit of the Trustee and his counsel. A copy of this report was later turned over to the Government voluntarily without the service of a subpoena. Your affiant has been informed and believes and therefore alleges that the report has been in the possession of the United States Attorney for the Southern District of New York during the last year. By reason of the foregoing it never was and is not now a public record and has never been filed in any court. * * *"

In response, petitioner submitted to the judges of the Court of Appeals[2] an affidavit by W. Scott Barrett, an attorney in San Francisco:

"* * * That sometime during the month of August, 1961, at the request of Kalman Greenhill,

[2] The Barrett affidavit also does not appear in the certified record, but was before the judges of the Court of Appeals. See footnote 1, *supra*.

affiant checked the original bankruptcy file of the Westco Steel Company in the United States District Court for the Northern District of California for the purpose of determining whether or not accountants' working papers and audited reports were in the file.

That after a careful examination, affiant determined that no such papers or reports were in said file and thereupon called Mr. Martin J. Dinkelspiel, Attorney for the Trustee of said bankrupt estate and was advised by Mr. Dinkelspiel that all accountants' working papers and audited reports had been turned over to the Federal Bureau of Investigation for transmittal to the United States District Attorney in New York.

That on or about June 13, 1962, affiant again talked to Mr. Martin Dinkelspiel and was advised that so far as he knew said papers and reports were still in the hands of the United States Attorney in New York and that he had no other knowledge as to their whereabouts. * * *"

The Court of Appeals had these affidavits before it in affirming the conviction. And in passing upon the claim that petitioner was entitled, by virtue of the Bankruptcy Act, to inspect the accountant's report, the Court of Appeals stated:

"The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant."

REASONS FOR GRANTING THE WRIT

The decision below, affirming the District Court's refusal to order the production of an accountant's report to the bankruptcy trustee, denied petitioner a right to which he was clearly entitled under the Bankruptcy Act, and is contrary to the principles of fair judicial administration enunciated by Mr. Justice Holmes for a unanimous Court in *Ex parte Uppercu,* 239 U.S. 435.

Section 47(a)(10) of the Bankruptcy Act mandates the bankruptcy trustee, as an officer of the bankruptcy court, to "furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest." Section 49 of the Act makes crystal clear that "the accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest." These duties were considered sufficiently important by Congress to be reinforced by criminal sanctions; 18 U.S.C. § 154 imposes a fine of up to $500.00 and a forfeiture of office on any trustee who "knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so."

It cannot be seriously contended that Greenhill was not a "party in interest". In the words of the Government's brief to the court below, "Between November 1954, and the date of its demise, the story of Westco Steel was the story of Kalman Greenhill . . ." (Gov't br., p. 3). He was an officer of the bankrupt (Indictment, par. 3; 2d ct., par, 2; 3d ct.. par. 2), and it was the bankrupt's assets which he allegedly transferred to himself. In construing this statute the Sixth Cir-

cuit said, "It is plain, to our minds, that the bankrupt is a party in interest with respect to proceedings whose object is to require a transfer of property under pain of contempt proceedings, and which may result in criminal proceedings . . ." *Petition of Moulthrop*, 249 Fed. 468, 470 (C.C.A. 6), aff'g *In re Greenbaum*, 243 Fed. 965 (E.D. Mich.). The reason for the request or the motive prompting it "cannot prejudice the assertion of a clear legal right or statutory privilege". *In re Sully*, 152 Fed. 619, 621 (C.C.A. 2). Accord: *Redmond* v. *United Funds Management Corp.*, 144 F. 2d 155, 159 (C.A. 8).[3] Petitioner's right to inspect the document was an absolute one by virtue of this Congressional mandate.

Quite aside from the clear command of the Bankruptcy Act, petitioner was entitled to the trustee's records under the principle of *Ex parte Uppercu*, 239 U.S. 435. On behalf of a unanimous Court, Mr. Justice Holmes wrote:

> "It appears from what we have said that there are documents present within the jurisdiction that furnish evidence material to the petitioner's case. The general principle is that he has a right to have them produced. It does not matter whether they have been used in the original cause or not, or to whom they belong. The right to evidence to be obtained from an existing object does not depend upon having an interest in it, or, in a case like this, upon having an interest in the original cause, or

[3] "The right of inspection under Sec. 49 of the Act is broad and absolute, and it obtains regardless of motive where asserted by a party in interest, such as a creditor." 2 Remington on Bankruptcy (1956), Sec. 1132, pp. 606-607. See also 2 Collier on Bankrupty (14 ed., 1962), par. 49, pp. 1831-1833; *In re Samuelsohn*, 174 Fed. 911, 912 (D.C.N.Y.); *In re Saur*, 122 Fed. 101, 103 (D.C.N.Y.).

upon the object being admissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing. The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this forbidding it . . ."[4]

This same liberal policy of full disclosure to aid in the search for truth underlies the opinion of Judge Learned Hand in *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2), quoted with approval in *Jencks* v. *United States*, 353 U.S. 657, 671:

". . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose

[4] The *Upperco* decision also reinforces liberal and broad construction of §§ 47 and 49 of the Bankruptcy Act, and was cited to this effect in *Redmond* v. *United Funds Management Corp.* 144 F. 2d 155, 159 (C.A. 8).

> them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively . . ."

The potential admissibility of these records is not the touchstone by which petitioner's right to inspect under the Bankruptcy Act is to be judged. *Redmond* v. *United Funds Management Corp.*, 144 F. 2d 155, 159 (C.A. 8); *In re Sully*, 152 Fed. 619, 621 (C.C.A. 2); *In re Moulthrop*, 249 Fed. 468, 469 (C.C.A. 6). If the Government can deny the use of records given it by the trustee, the trustee assumes the characteristics of a partisan, contrary to his role as an officer of the court. Indeed, if under the Bankruptcy Act the trustee can give records to the Government and withhold them from petitioner—an officer of the bankrupt charged with a crime in connection with the bankruptcy—there is no law or rule which would prevent another trustee from giving information to a corporate officer and denying it to the Government.

The Court of Appeals held that petitioner "was not harmed by his lack of the report in question." But such speculation is inadmissible, for reasons given by Chief Justice Marshall in *United States* v. *Burr*:[5]

> "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? . . .

[5] 25 Fed. Cas. 187, 191, quoted in *Jencks* v. *United States*, 353 U.S. 657, 668.

> "... It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld? ..."

As the Court said in *Clancy* v. *United States*, 365 U.S. 312, 316, "since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively". That rule lays bare the error of the speculative conclusion of the court below that petitioner was not harmed by the lack of the report in question. Such speculation—as is true of all speculation made in a vacuum—may be totally wrong in fact. If the unproduced report was based even in part on books and records not available to petitioner[6] and if the report contained leads to other evidence of aid to the defense, then petitioner was indeed harmed by the lack of the report. The short of it is that the real impact of the refusal to produce the report cannot be measured without having the report available.

Indeed, the shoe is on the other foot. The Government points to no reason why access to these records, in its possession, should have been denied to the defense. In numerous recent cases this Court has been faced with the task of balancing the need of the defense for documents or other information against the interest of

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[6] Since Westco's books contained no entries after November 30, 1955, and since it would be most unusual if an accountant's report made some time after the institution of the bankruptcy proceedings in 1956 would deem itself bound by the absence of such entries, it seems more likely that the report did contain facts based on records not otherwise available to petitioner at the time of trial. The judgment as to the utilization of such a report is ultimately one to be made by defense counsel.

the Government in maintaining secrecy. See, e.g., *Roviaro* v. *United States*, 353 U.S. 53, 62; *Jencks* v. *United States*, 353 U.S. 657, 669-672; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398-401. There is no policy here to balance against the "general principle that [defendant] has a right to have them produced". *Ex parte Uppercu, supra.* On the contrary, Congress has affirmatively declared that the public interest requires that these records and accounts be opened and has supported this policy with criminal sanctions. The Government's resistance of petitioner's motion for production was not supported by reliance on a need for secrecy, but rather partakes of the "sporting theory of justice" which is now discredited. See *Ex parte Uppercu, supra; Daly* v. *Dimmock*, 55 Conn. 579, 12 Atl. 405; cf. *Hickman* v. *Taylor*, 329 U.S. 495; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214; 6 Wigmore on Evidence, Sec. 1845 (3rd ed., 1940).

The decision below, denying petitioner his statutory right—declared by all precedent to be absolute in nature—deprives him of the fair treatment which Congress sought to accord to all parties in interest. It is in direct conflict with the plain statutory language and with the fundamental tenets of even-handed justice as set forth in the *Uppercu* decision. The assertion of this Court's review powers is thus appropriate.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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